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F.No. 198/455-456/11-RA
GOVERNMENT OF INDIA
MINISTRY OF FINANCE
(DEPARTMENT OF REVENUE)
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14, HUDCO VISHALA BLDG., B WING
6th FLOOR, BHIKAJI CAMA PLACE,
NEW DELHI-110 066

Date of Issue..18/12/13

ORDER NO. 1405-1406 /2013-CX DATED 13.12.2013 OF THE GOVERNMENT OF INDIA, PASSED BY SHRI D P SINGH, JOINT SECRETARY TO THE GOVERNMENT OF INDIA UNDER SECTION 35 EE OF THE CENTRAL EXCISE ACT, 1944.

Subject : Revision application filed under Section 35 EE of the Central Excise Act, 1944 against the order-in-appeal No.47-48/CE/LDH/2011 dated 24.02.2011 passed by Commissioner (Appeals) Central Excise, Chandigarh-II.

Applicant : Commissioner, Central Excise Commissionerate, Central Excise House, F Block, Rishi Nagar, Ludhiana.

Respondent : (1) M/s Shirdi Overseas Import & Export.
(2) M/s Advance Networking Marketing Pvt. Ltd., Ludhiana

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ORDER

These revision applications are filed by Commissioner, Central Excise Commissionerate, Ludhiana against the common orders-in-appeal No. 47-48/CE/LDH/2011 dated 24.02.2011 passed by passed by Commissioner Central Excise Commissioner (appeals), Chandigarh-II with respect to Orders-in-Original passed by the Deputy Commissioner, Central Excise Division-I, Ludhiana.

S. No.	Applicant	Respondent	R.A. No.
1	Commissioner of Central Excise, Ludhiana	M/s Shirdi Overseas Import & Export, Ludhiana	F.No.195/455-456/11-RA
2.	-do-	M/s Advance Networking Marketing Pvt. Ltd., Ludhiana	-do-

2. Brief facts of the cases are that the respondent No.1 had cleared excisable goods for export under claim for rebate of duty under Rule 18 of Central Excise Rules, 2002 read with Notification19/2004-CE(NT) dated 06.09.2004 as amended either in their own account or through merchant exporter, directly from the factory under self sealing and self certification procedure. The Respondent No.1 filed the following rebate claim with Central Excise Division-I, Ludhiana for sanction under Section 11B of the Central Excise Act, 1944 (here-in after referred to as the Act):

Sr. No.	ARE-1 No. & date	Amount (in Rs.)
1	12 dated 12.11.05	325095

2.1 M/s Advance Netways Marketing Pvt. Ltd. Ludhiana (herein after referred as respondent No.2) had also filed rebate claim for Rs. 4,01,472/- as a merchant exporter, under Section 11B of the Act in respect of following ARE-1 issued by M/s Shirdi Overseas Imports & Exports, Ludhiana:

Sr. No.	ARE-1 No. & date	Amount (in Rs.)
1	25 dated 12.11.05	401472

2.3 The rebate claims before sanction were subjected to requisite verification/scrutiny regarding payment of Central Excise duty. The scrutiny of the photocopies of the purchase invoices for month Oct., 05 and Nov., 05 revealed that the Respondent No. 1 had taken Cenvat Credit amounting to Rs.45,38,605/- during the period Oct. 05 on the strength of invoices issued by M/s Braun Textile Processors, 863, Industrial Area-A, Ludhiana (Dealer hereinafter referred to as M/s BTPD). M/s BTPD had passed on this Cenvat Credit to the Respondent No.1 on the strength of the invoices issued by the suppliers situated at Surat in favour of M/s BTPD during the period April, 2004 to July, 2004, whereas, M/s BTPD had shown the receipt of the material during the period July, 05 to Sep., 05 i.e.. after more than one year. M/s BTPD was asked to explain the delay. M/s BTPD in his reply intimated that they had taken delivery of goods in their premises in the month of July & August, 05 as in 2004 their overseas buyers cancelled the order and they denied to take delivery of the goods; that the suppliers kept on pursuing them to take delivery of goods as they had not taken back the goods; that ultimately in the month of June, 2005 they received export orders for supply of goods for which the goods in question was to be used as raw material, so they took the delivery of goods accordingly. But, M/s BTPD failed to produce any documentary evidence regarding delay in purchase and also failed to produce any documentary evidence to the effect that these goods had actually been received. In the absence of any documentary evidence to the effect that these goods had actually been received, it was doubtful to ascertain the genuineness of the Cenvat Credit out of which the respondent No.1 had paid duty and respondent No.1 and respondent No.2 had filed rebate claims.

2.4 Provisions contained in rule 18 of Central Excise Act, 2002, read with Notification No. 19/2004-CE(NT) dated 06.09.2004 stipulates that rebate was admissible only if duty had been paid on exported goods. In the instant case, the respondent No.1 had paid duty allegedly from the balance of Cenvat Credit which was not admissible to them as discussed above. When availment of Cenvat Credit is ab-initio not admissible the respondent No.1, therefore, the so called payment of Central Excise duty in respect of present rebate claims were no more payment

of Central Excise duty. As such it was alleged that the dealer had passed irregular Cenvat Credit to the respondent No.1. It was, therefore, imputed that since the Cenvat Credit utilized for payment of duty of the export goods was wrongly availed and not admissible, its utilization and rebate thereon was not admissible. Since the amount involved in all the rebate claims mentioned above were arisen from the utilization of the irregular Cenvat Credit passed by the dealer of the respondent No.1, as such show cause notices were issued to the respondent proposing rejection of the rebate claims filed by them.

2.5 The adjudicating authority vide Order-in-Original No. 45-46/R/DC/Ldh-I/06-07 dated 10.08.2006 rejected the rebate claim of all the respondent parties. Aggrieved against the orders of the adjudicating authority, the respondent No.1 and 2 filed appeals withbefore the Commissioner (Appeals). The Commissioner (Appeals), vide Order in Appeal No.77-84/CE/Ldh/2007 dated 30.03.2007, decided the appeals alongwith other appeals on similar issue and remanded the cases back to the adjudicating authority observing that the rebate claims can be kept pending till the issue of admissibility of Cenvat used for discharge of duty on export goods is decided. The department being aggrieved with the order of the Commissioner(Appeals) filed Revision applications with the Revisionary Authority i.e. the Joint Secretary, (Revision Application) on the grounds that after amendment in Section 35A of the Act with effect from 11.05.2001, the Commissioner (Appeals) could not remand back the case to the adjudicating authority. The Revisionary Authority vide Order No.313-323/10-CX dated 17.02.2010 set aside the Order in Appeal No.77-84/CE/Ldh/2007 dated 30.03.2007 and directed the Commissioner (Appeals) to decide the case on merits. Commissioner (appeals) reconsidered the cases on merits and decided all the cases in favour of respondents.

3. Being aggrieved by the impugned orders-in-appeal, the applicant department has filed these revision applications under Section 35 EE of Central Excise Act, 1944 before Central Government on the following grounds:-

3.1 The Commissioner (Appeals) has erred in observing that the Show Cause Notice dated 10.11.06 issued to the respondent No.1 for recovery of entire Cenvat Credit of Rs. 6,92,48,992/- taken during the period Oct., 05 to June, 06, is still pending adjudication. The said Show Cause Notice dated 10.11.06 has already been decided by the Commissioner, Central Excise, Ludhiana vide OIO No. 42/Ldh/08 dated 31.3.09 and in the said OIO the adjudicating authority has confirmed the Cenvat Credit demand of Rs.6,65,04,716/- against the respondent No.1 along with interest. A penalty of Rs.6,06,80,873/- was also imposed on the respondent No. 1. Thus, the Commissioner (Appeals) without verifying the factual status of the Show Cause Notice has wrongly held that the Show Cause Notice issued to the respondent No.1 is still pending. Based on this incorrect observation, Commissioner (Appeals) has drawn inferences in the subsequent para in the OIA. Therefore, the OIA based on wrong premise is bad in law.

3.2 The Commissioner (appeals) relying upon Tribunal orders in the case of CCE, Ahmedabad Vs. Lubi Electronics reported in [2009 (245) ELT 551 (Tri. Ahmd.), M/s Coromendal fertilizers ltd. Vs CCE(A) reported in [2009(239)EL T99], CCE,Ahmedabad Vs Dishman Pharma & Chem Ltd. reported in [2007(210) ELT 124] and Pierlite India Pvt. Ltd. Vs CCE, Ahmedabad reported in [2010(17) STR237] observed that there is no limit for taking credit as such allegation of the department that cenvat credit had been taken on the inputs, which had been received after a gap of more than one year after their removal, did not sustain. The Commissioner (Appeals) while observing above had totally ignored the facts of the case. In the instant case the issue is not only the delayed taking of the cenvat credit but also the delayed receipt of the so called inputs, that too after a gap of more than one year.. The party had failed to provide any documentary evidence which could establish the fact that they had actually received the goods after one year and where those goods were lying for a period of more than one year. The dealer had in fact failed to submit any documentary evidence that these goods were actually received by them. So if dealer has not received the goods, the party cannot receive it and dealer has passed irregular credit and party has taken irregular credit. Moreover, during investigation by the department it was found that the Cenvat credit from which duty was said to be paid by the

respondent No. 1 on the so called goods exported was found to be availed fraudulently. The credit was found to be availed by them on the basis of fake/bogus invoices issued by various non- existent firms/companies without actually receiving the inputs. No evidence regarding transport of, inputs from the consignee to the dealer and then to the party like transit-octroi receipts etc. were found. Most of the parties issuing invoices to the dealer were bogus/non-existent.

3.3 The Commissioner (Appeals) observed that rebate cannot be denied on the basis of surmises and conjunctures when the fact was that the exports had taken place. The Commissioner (Appeals) while observing this had totally ignored the fact that the party had paid duty out of the balance of cenvat credit not admissible to them. The dealer and the party had not shown evidence of actual receipt of inputs. Further in the discreet investigation carried by the department against the party it has been found that the party was not having the facility to manufacture such a large quantity of goods which they claimed to have been exported but also earthed out the fact that the party had no proof to confirm that the inputs were transferred to various job workers for manufacture and the receive back the finished goods from those job workers. The Commissioner (Appeals) could have taken into account the findings of investigations before allowing the appeal of the parties.

3.4 The Commissioner (appeals) relying upon many judgment has observed that the procedural and technical lapses can be ignored in the even of factum of export being satisfied and the goods had been exported. The Commissioner (Appeals) while observing the above should have noted the fact that this is not a normal case where the procedural lapse can be ignored. In the instant case the party had fraudulently fabricated the Cenvat documents worth crores of Rupees to avail the export rebates fraudulently. The fudging of Cenvat documents had already been proved against the respondent No.(1) during investigations conducted against them. The Commissioner (Appeals) while observing the export irregularities in export documents should have taken cognizance of the fact that the party's involvement in fraudulent availment of Cenvat credit had already been established.

3.5 The Commissioner (Appeals) has also erred in not appreciating the spirit of the provisions of the law while deciding the present case. The provisions of the Cenvat Credit Rules, 2002 clearly provide that only that portion of the Cenvat credit can be utilized towards payment of duty on final products, which have been earned on duty paid inputs, which have been received in the factory for use in or in relation to manufacture of final products. Whereas in the present case, the party utilized Cenvat credit which was not admissible to them as neither any duty had been paid by the manufacturers suppliers of inputs thereof nor inputs were received in the factory of the party and only bogus fabricated invoices have been found to be generated. Therefore the goods exported on payment of duty from fraudulently availed Cenvat credit cannot be treated as duty paid goods and thus no rebate is admissible to the party.

3.6 In the era of liberalization and open economy, total reliance has been placed on the assesses and they are enjoying various facilities such as self removal of final products, self assessment of duty, self sealing of export consignments, self certification, making payment of duty on monthly basis etc. In the present case also, the party is enjoying all these facilities, but got involved not only in the fraudulently taking Cenvat credit but also in the utilization of the same towards payment of duty on the goods cleared for exports with the sole motto of getting it encashed by filing rebate claim with the department. The party has taken Cenvat credit in respect of the goods, which have never even come into existence and the question of payment of duty thereon; transportation and receipt thereof in the factory of the party do not arise at all. The party has played a clear-cut fraud with the Government revenue. Therefore allowing them the rebate of the duty paid from the fraudulently availed Cenvat credit would mean as to granting of blanket permission to the fraudsters to get involved in this type of illegal and unlawfur practice of making money, which is totally contrary to the provisions of the law.

4. Show Cause Notice was issued to the respondent under Section 35EE of Central Excise Act, 1944 to file their counter reply in terms of section 35 EE of the Central Excise Act, 1944. However, no counter reply has been received from the respondent.

5. Personal hearing was scheduled in this case on 06.12.2012, 20.02.2013 and 15.10.2013. Nobody appeared for hearing on these dates. Hence, Government proceeds to decide the case on merits on the basis of available records.

6. Government has carefully gone through the relevant case records and perused the impugned Order-in-Original and Order-in-Appeal.

7. Government observes that respondent No. (1) and (2) filed different rebate claim of duty paid on exported goods. Respondent No. (2) is a merchant exporter who exported the goods covered vide various AREs-1 issued by the respondent No.(1), who paid such duty from Cenvat Credit passed on by M/s Braun Textile Processor (BTPD), 863, Industrial Area-A, Ludhiana, a dealer. On investigation it was revealed that M/s BTPD passed on Cenvat Credit to respondents, which was fraudulently availed. As such, duty paid nature of impugned goods could not be established. Accordingly, the original authority rejected the rebate claims filed by the respondents. Commissioner (appeals) decided the cases in favour of respondents. Now, the applicant department has filed these Revision Applications on grounds mentioned in para (3) above.

8. The department has contended that a detailed investigation carried out in this case has established that BTPD, a dealer, passed on said cenvat credit to M/s Shirdi Overseas Respondent No.1, a manufacturer, fraudulently without supplying any goods. Department has further stated that a show cause notice for demand of wrongly availed cenvat credit of Rs. 6,65,04,716/- was issued to Respondent No.1 and same was confirmed vide Order-in-Original No. 42/Ldh/08 dated 31.03.09 along with applicable interest and equal Penalty was also imposed. In the said order-in-original, adjudicating authority has held that M/s Shirdi Overseas has fraudulently availed the cenvat credit. Therefore duty paid on goods exported vide ARE-I No.12 dated 12.11.05 cannot called as payment of duty as such payment of duty was shown on paper only to fraudulently avail the rebate claims. The governing statutory provisions of grant of rebate stipulated in Rule 18 of Central Excise Rules, 2002 reads as under:

"Rule 18: Rebate of Duty: Where any goods are exported, the Central Government may, by notification, grant rebate of duty paid on such excisable goods or duty paid on materials used in the manufacture or processing of such goods and the rebate shall be subject to such conditions or limitations, if any, any fulfillment of such procedure, as may be specified in the notification."

The provisions of said rule stipulate that rebate of duty paid on excisable goods exported is to be granted. The notification No.19/04-CE(NT) dated 6.9.04 issued under rule 18, stipulates the condition and procedure to be followed for availing rebate claim. In these cases, duty found to be paid from fraudulently availed cenvat credit as held in the above mentioned Order-in-Original dated 31.03.2009 wherein demand of wrongly availed cenvat credit has been confirmed. The respondent party has not reported whether any appeal is filed against said Order-in-Original dated 31.3.09 or any stay is granted by Hon'ble CESTAT. Under such circumstances, said duty paid cannot be treated as duty paid in accordance with the provisions of Central Excise Law. Since valid duty payment only can be rebated under rule 18 of Central Excise Rules 2002 read with Notification No.19/04-CE (NT) dated 6.9.04., the rebate claims of duty paid from fraudulently availed cenvat credit are not admissible. As such the rebate of claim of Rs.325095 in respect of goods exported vide ARE-I No.12 dated 12.11.05 by M/s Shirdi Overseas respondent No.1, is not admissible under Rule 18 of Central Excise Rules 2002 read with Notification No.19/04-CE(NT). The impugned order-in-appeal is therefore set aside to this extent and impugned order-in-original with reference to this rebate claim gets restored.

9. Government notes that the respondent No.2 M/s Advance Netways Marketing Pvt. Ltd., Ludhiana is a merchant exporter who has purchased the said goods from manufacturer respondent No.1 on payment of duty on the valid duty paying central excise invoices, and then exported the goods as per ARE-1 No.25 dated 12.11.05. There is no dispute about compliance of the provision of Notification No.19/04-CE(NT) dated 6.9.04 and export of goods. The dispute is regarding payment of duty since it was paid from wrongly availed cenvat credit. There is no allegation that merchant exporter is party to said fraud in fraudulent

availment of cenvat credit. As such there are no malafides attached to the transaction made by merchant exporter.

9.1 Government notes that the similar issue has already been decided by the revisionary authority vide GOI Order No. 304-307/07 dated 18.5.07 (F.No.198/320-323/06) in the case of M/s Shyam International Mumbai. In this case revision application was filed by department i.e. CCE Mumbai against the orders-in-appeal No. 326 to 329/M-III/2006 dated 18.05.06 passed by Commissioner of Customs and Central Excise (Appeals) Mumbai Zone-II. In the said GOI Order it was held that the merchant exporter can not be denied the rebate claim for the reason that manufacturer has availed Cenvat Credit wrongly on the basis of bogus duty paying documents when there is no evidence to show any mutuality of interest, financial control, any flow back or fund flow between the applicant merchant exporter and manufacturer/supplier of goods.

The relevant operative portion of the said order is reproduced below :

"5. Govt. has considered the submissions both written and oral made by the applicant Commissioner as well as by the respondent. It is observed that as per order-in-originals, there is no doubt that the goods have been exported out of India in terms of Rule 18 of Central Excise Rules, 2002 read with procedure prescribed u/n No. 40/2001-CE(NT) dt. 26.6.01. under certification of Customs authorities at the port of export. There is no observation to the contrary either in the Order of rebate sanctioning authority or order of Commissioner (Appeals). It is also not a ground in the Revision Application. It is also observed that goods were supplied to the respondent under cover of duty paying Central Excise documents and in the invoices issued the duty amount paid by manufacturer has been mentioned and for the goods supplied the respondent has made payment of total amount inclusive of Central Excise duty. This position is not disputed. The only statutory requirement of duty paid character by way of certification by Supdt. Central Excise in triplicate copy of ARE-1 in terms of Not. 40/2001-CE(NT) dt. 26.6.01 read with paras 8.3 and 8.4 of Central Excise Manual is also not in dispute. In the order in original and order in appeal and the Revision Application, there is also no charge or allegation that the transaction between exporter/respondent and the manufacturer/supplier was not at arms length or not in the nature of a transaction in the normal course of business or non-bonafide and influenced by any extra commercial consideration. In fact there is nothing on record to establish, much less point out even prime facie any role direct or indirect, connivance or intention of respondent in the act of procurement of inputs by supplier manufacturer on basis of bogus invoices. The charge in the Revision Application is that the manufacturer/supplier had availed Cenvat Credit on basis of bogus invoices which is under investigation and since this wrong credit was availed without taking reasonable steps in terms of Rule 7 of Cenvat Credit Rules 2002 (now Rule 9(2) of Cenvat Credit Rules 2004), the duty paid on exported goods through debit entry of this wrongly availed credit cannot be rebated to the respondent/merchant exporter who purchased the goods and exported them. The only charge or allegation forming the genesis and basis for denial of rebate claim to the merchant/exporter is therefore not against him but the manufacturer supplier who availed Cenvat Credit wrongly and availed the same for duty payment of goods exported by the respondent merchant exporter. In this regard, Govt. observes that sufficient legislative and machinery provisions exist in Central Excise Act/Rules to recover such allegedly wrongy availed and utilized credit from the manufacturer supplier of finished goods along with interest and penalty. Rule 14 of Cenvat Credit Rules 2004 provides that where Cenvat Credit

has been taken or utilized wrongly, it has to be recovered from the manufacturer along with interest and provisions of Sec. 11A (recovery of duties not levied or not paid or short-paid or erroneously refunded) and 11AB (interest on delayed payment of duty) of the Act shall apply mutatis mutandis for effecting such recoveries Rule 15 of Cenvat Credit Rules provides if any person takes Cenvat Credit wrongly or without taking reasonable steps to ensure that duty has been correctly paid on goods as indicated in accompanying documents as per Rule 9, he shall be liable to penalty not exceeding the duty involved on excisable goods in respect of which contravention is committed. As in the instant case where duty has been collected from the exporter respondent but allegedly not paid to govt., they are also recoverable along with interest in terms of Sec. 11D and 11DD of Central Excise Act, 1944. The allegedly wrongly availed and utilized credit is thus recoverable along with interest and penal action in a parallel proceeding which is separate and independent and which has also been initiated against the supplier/manufacturer and investigations are going on. The respondent/exporter who has bonafidely purchased and exported the goods after payment of entire amount inclusive of duty per se cannot be also penalized by way of denying his claim of rebate if otherwise it is in order, especially when no evidence has been laid to show any mutuality of interest and financial control or any flow-back or fund flow between the respondent exporter and the manufacturer supplier of goods. This is necessary for denying him benefit of rebate on goods purchased legitimately in ordinary course of business from the supplier/manufacturer by paying him the entire amount inclusive of duty and exporting them as per procedural requirements of Rule 18 of Central Excise Rules read with Notification No. 40/2001-CE(NT) dt. 26.6.01.

6. An issue similar and pan materia relating to disallowance of Cenvat Credit to the user manufacturer on the basis that the inputs supplier/supplier manufacturer had wrongly availed and utilized credit for duty payment on basis of forged/bogus invoices had come up for consideration before CESTAT several times wherein it has been consistently held that such credit cannot be denied to the user manufacturer in case the transaction between the two was at arms length and not influenced or tainted by any factor other than commercial, and the credit was availed on basis of Central Excise documents showing duty payment particulars and payment of goods made to the inputs supplier was inclusive of duty element. As per the ratio of these judgements, some of which have also been cited in support by respondent but not discussed in the revision application, action in such cases for recovery and penal action lies on the supplier manufacturer who wrongly took and utilized the credit and not on user manufacturer. This issue was examined in detail by the Tribunal in case of R.S. Industries—2003(1 53) ELT I14(Tri) wherein it was held that

"In these 12 appeals, arising out of a common Order—in—Original No. 41/2001 dated 30.10.2001 passed by the Commissioner, Central Excise, Delhi-I, the common issue involved is whether the Modvat credit is to be disallowed to all the appellants on the ground that the supplier of the inputs has taken the Modvat credit on fake and bogus invoices and utilized the said credit towards payment of duty in respect of inputs supplied to the appellants.

2.... The appellants availed of Modvat credit of the duty paid on the inputs received from the suppliers, that one of the supplier of inputs is M/s Prerna Metal industries; that the inquiries initiated against the said Prerna Metal Industry revealed that they had taken the Modvat credit on the strength of invoice which were fake and bogus and were never issued to M/s Prerna Metal industry by any of the firms whose name were mentioned in the invoices; that the Commissioner under the impugned order has disallowed the Modvat credit amount to Rs. 46, 78,462/- to M/s Parerna Metal Industry and ordered to recover the amount of Rs. 43,99,947/- passed as illegal Central Excise duty to various buyers besides imposing penalty on Prerna Metal Inds. That the Commissioner has also disallowed the Modvat Credit availed by the appellants on the basis of invoices issued by Prerna Metal Inds. on the ground that as the Credit was wrongly availed of by .Prerna Metal industries, the goods cleared by them to the appellants have to be treated as cleared without payment of appropriate duty.....

3.....

4.....

5. We have considered the submissions of both the sides. The Revenue has not challenged the findings contained in the impugned Order to the effect that the allegation of non-

receipt of goods by the Appellants has not been established beyond doubt in view of the fact that Prerna Metal Inds. had bought material from Delhi Aluminum Corporation which was substantial in nature. Once the revenue is not disputing the receipt of goods under the cover of invoice by the appellants which contained duty paying particulars the Modvat Credit cannot be denied to the appellants. As far as the appellants are cconcerned, they have purchased the goods which are dutiable on the strength of the invoices carrying duly payment particulars..... We, therefore set aside the disallowance of the Modvat credit and recovery of the said amount from the appellants.

6. While upholding Commissioner(A) order, similar view was taken in CCE Pondichery Vs. Spic Pharmaceuticals 2006 (74) RLT 402(CESTAT-Chennai). Again in Parasrampuria Synthetics Ltd. Vs. CCE,. Jaipur 2005(191) ELT 899(Trib.-Del) it was also held that for mistake in payment of duty by supplier, the issue is to he raised at supplier end and not at the applicant's as they had taken credit on the basis of invoice which is specified duty paid document. In a similar matter, in Bhairav Exports Vs. Commissioner of Central Excise, Mumbai 2007(210) ELI 1 36 (Fri. Mumbai), the same view was confirmed that if the appellant had taken credit on basis of Central Excise invoices containing duty payment particulars such credit cannot be denied on the basis that such duty had in fact not been paid by the manufacturer supplier."

7. Another ground forming the basis for denial of rebate as per the revision application is also that in terms of Explanation to sub-rule 2 of Rule 7 Cenvat Credit Rules, 2002 (now sub-rule(3) of Rule 9 of Cenvat Credit Rule 2004) responsibility is cast on the manufacturer who avails credit to take reasonable steps to ensure that the inputs in respect of which credit is availed are goods on which appropriate duty of excise as indicated in the documents has been paid. In the instant case, the manufacturer supplier M/s Ashapura Textile Industries as alleged had failed to take such reasonable steps for verifying addresses of manufacturers who issued invoices to them. As per ratio of various decisions discussed above, it is, however observed that action for not taking such reasonable steps as alleged definitely lies squarely on the manufacturer supplier but not on the applicant/merchant exporter who at third stage purchased the goods bona fidely in normal course of commercial activity and exported them on the strength of clearances to them on ARE-1s and Central Excise Invoices indicating duty payment particulars showing all other details of manufacturers addresses, value etc. and the entire amount inclusive of duty has also been paid by them to supplier manufacturer. The applicant merchant exporter under the circumstances cannot be held responsible for having not taken adequate reasonable steps in terms of Rule 9 of Cenvat Credit Rules, 2004 provides that manufacturer taking credit is deemed to have taken reasonable steps if he satisfies himself about identity and address of the manufacturer issuing the invoice evidencing payment of duty. The department has itself issued Central Excise Registration Certificate to the manufacturer. This view on admissibility of Cenvat Credit under similar situation was taken by CESTAT in Prachi Poly Products Ltd. Vs. Commissioner of Central Excise Raigad – 2005(186) ELT 100(Tri.-Mumbai) and similar instructions also exist in CBEC Circular No. 766/82/2003-CX dated 15.12.2003 in clarifying that where the supplier defaults any payment of duty , the same along with interest is recoverable from him and action against the consignee to reverse/recover to the credit is not to be resorted to as long as the bona fide nature of consignees transaction is not in dispute.

8. Apart from the above fact that such transaction should be of bona fide nature, principles of reasonable expectation from the merchant/exporter and safeguards to be exercised by him do require that he should take reasonable steps to satisfy himself about the existence, identity and address of the supplier/manufacturer. In the present case the supplier/manufacturer is a Central Excise registered manufacturing unit and there seems no dispute regarding its existence and identity and as shown on documents supplied with rebate claims. There is also no such charge or allegation in the orders of lower authorities or in the Revision Application filed to indicate that the manufacturer/supplier is itself a non-existent or bogus unit or had obtained Central Excise registration under erstwhile Rule 12B of Central Excise Rules on basis of any forged/fabricated document or information including identity and address. If such a charge existed then despite purchase of goods by merchant exporter on basis of Central Excsie documents/invoices showing duty payment particulars, the entire transaction would have been non-bonafide. In the present case there is no such charge.

9. The Export Promotion and Incentive Scheme of Rebate broadly envisage under Rule 18 of Central Excise Rules that whatever duty has been paid on exported goods may be given back as rebate to the exporter who earns valuable foreign exchange. This is the legislative intent of Rule 18 of Central Excise Rules and should form the foundation of judicial interpretation [(211) ELT 12 (SC)]. If the exporter as in the instant case has procured goods from the supplier/manufacturer under cover of proper Central Excise documents, including invoices showing duty payment particulars and payment has been made of entire amount inclusive of duty and goods exported as per prescribed procedure, it will be legally incorrect to deny him the benefit of rebate in case there is no charge that the transaction between the supplier and exporter was not at arms length. or non— bona fide or the exporter had any nexus/connivance or any other role to play in the alleged wrong procurement of inputs by the supplier/manufacturer on bogus invoices. There is no such charge or ground in the Revision Application as also in orders of Commissioner(Appeals)/ orders of Adjudicating Authority. As already discussed legal provisions exist in the Central Excise Act, 1944 and Cenvat Credit Rules, 2004 for recovery of such alleged wrongly availed credit from the supplier/manufacturer along with interest and penalty but the respondent/exporter in the facts and circumstances already discussed cannot also he denied his otherwise legitimate rebate claim."

9.2 Government notes that similar issue was involved in the case of M/s Roman Overseas decided by Government vide G.O.I. order No. 129/10-CX dated 07.01.10 relying on said G.O.I. order No. 304-307/07 dated 18.05.07 in the case Shree Shyam international Mumbai. The above mentioned G.O.I. order No. 129/10-CX dated 07.01.10 was challenged by department in a writ petition filed before Gujarat High Court. Now Hon'ble High Court of Gujrat vide order dated 31.03.11 reported as 2011 (270) ELT 321 (Guj.) has upheld the said G.O.I. order dated 07.01.2010. The para No. 10 to 15 of said judgement are reproduced below:-

"10. From the material on record noted above, we find that insofar as respondent M/s Roman Overseas is concerned, it had purchased goods after payment of duty to the manufacturer. On such duty, respondent M/s Roman Overseas was within its rights to claim cenvat credit which was passed on by the seller of the goods i.e. M/s Unique Exports. It is of course a fact that such goods were not duty paid. Fact however, remains that there are no allegations that respondent M/s Roman Overseas was part of any such fraud, had any knowledge of the fact that duty was not paid or t hat it had failed to take any precaution as required under sub-rule(3) of Rule 9 of Cenvat credit Rules which reads as under.

11. in view of above discussion, we find that respondent M/s Roman Overseas cannot be denied the benefit of rebate claims. Particularly, when there are no allegations that respondent M/s Roman Overseas either had knowledge or had even failed to take basic care required in law or in general terms to verify that goods were duty paid.

12. The language of Rule 18 however, may pose some question. In particular, it may be contended that Rule 18 envisages rebate for duty paid. Term duty paid as per the department would be duty paid to the Government and not otherwise and when no duty is paid, there can be no rebate. In our views, however Rule 18 also can be looked from this angle. Insofar as respondent M/s Roman Overseas is concerned, it had paid full duty partly by paying duty directly to the Government and partly by availing cenvat credit. To do so, they had made payment of part duty to seller of goods. Insofar as respondent M/s Roman Overseas is concerned, therefore, entire duty is paid by them of which it is claiming rebate of the duty paid on excisable goods upon eventual export.

13. At this stage, we would like to deal with the judgements cited by the counsel for the department.

1) Reliance was placed on decision in case of New India Assurance Co. Shimla v. Kamla and others reported in (2001) 4 Supreme Court cases 342. In that case a driving license upon its expiry was presented for renewal. Authorities unmindful of its defects, renewed the same. The Insurance Claim repudiated the claim citing the reason that the original license was forged. It was contended that even if previously license may have been forged, upon renewal would be rendered valid. It was in this background that Supreme Court observed that "What was originally a forgery would remain null and void forever and it would not acquire legal validity at any time by whatever process of sanctification subsequently done on it. Forgery is antithesis to legality and law cannot afford to validate a forgery."

2) Reliance was placed on decision of Punjab and Haryana High Court in case of Golden Tools International v. Joint DGFT, Ludhiana reported in 2006 (199) ELT 213 (P&H). It was however, a case where the petitioners themselves had imported duty free item on the basis of DEPB allowance which was found to have been fraudulently obtained. It was in this background that the Court held that same would tantamount to contravention of provisions of Foreign Trade (Development and Regulation)Act, 1992. Penalty imposed was thus upheld.

3. Reliance was also placed on decision of Punjab and Haryana High Court in case of Friends Trading Co. v. Union of India reported in 2010 (254) ELT 652 (P&H), wherein again DEPB scrips were found to have been obtained by producing false documents. There again the person claiming the duty exemption was the same as one who was found to have committed fraud.

4. Reliance was placed on decision in case of Sheela Dyeing & Printing Mills P. Ltd. vs. CCE & C, Surat-I reported in 2008 (232) ELT 408 (Guj), wherein issue involved was whether while taking cenvat credit on inputs, the applicant had taken reasonable steps to ensure that goods are duty paid. It was in this background relying on sub-rule (2) of Rule 7 of Cenvat Credit Rules, Court found that appellant had failed to take such care. In the present case, we have already noticed that such averments and allegations are not on record. In fact findings are to the contrary.

14. In the result, we are of the view that impugned orders require no interference.

14.1 We may also notice that department has issued notice to the original firms namely M/s Amar Enterprises and M/s Harikrishna Enterprise for recovery of duty and penalty. This would thus show that department is pursuing the original entities for recovery of cenvat credit wrongly claimed whereas on other hand it is denying rebate claim of the manufacturer exporters. We may also notice that against M/s Unique exporters, no proceedings have been initiated.

14.2 We may also record that though counsel for respondent M/s Roman Overseas contended that without cancellation of cenvat credit granted to M/s Unique Exports, rebate claimed by respondent M/s Roman Overseas cannot be raised by respondent M/s Roman Overseas in facts of the present case. As already noted, before the competent authority the stand of respondent M/s Roman Oversea was clear that fraud was not disputed, but that respondent M/s Roman Overseas was not part of such fraud and that all reasonable care was taken to ensure that goods were duty paid.

15. Before closing, however, we may reiterate that the facts in present case are peculiar. Had there been any allegations and evidence to show that respondent M/s Roman Overseas was either part of the fraud in nonpayment of excise duty or had knowledge about the same or even had failed to take care as envisaged under sub-rule(2) of Rule 7 of the Cenvat Credit Rules, situation would have been different. In the present case, when no such facts emerge, we have no hesitation in confirming the view of the Government."

9.3 Government notes that applicability of G.O.I. order dated 18.05.07 has been categorically upheld by Hon'ble High Court. It is also mentioned here that in

the case CCE Mumbai- I Vs. Raibow Silk Mills, Hon'ble High Court of Bombay vide order dated 27.06.11 in W.P. 3956/10 reported as 2011 (274) ELT 501 (BOM) has also expressed almost similar view. Hon'ble High Court has not questioned Government decision in the G.O.I. order No. 304-307/07 dated 18.05.07 in the case of Shree Shayam International. Government notes that regarding the point whether duty paid from illegally accumulated Cenvat Credit can be termed as duty paid for the requirement of Rule 18 of the Central Excise Rules, 2002, Hon'ble Gujrat High Court in the above said judgement para 12, has categorically held that merchant exporter has made payment to the manufacturer i.e. seller of goods and therefore entire duty is paid by them of which it is claiming rebate of duty paid on excisable goods upon eventual export.

9.4 In view of above position, Government holds that rebate claim of Rs.401472/- allowed to M/s Advance Netways Marketing Pvt. Ltd., Ludhiana in respect of goods exported vide ARE-1 No.25 dated 12.11.05 is legal and proper and was rightly held admissible under Rule 18 of Central Excise Rules 2002 read with Notification No.19/04-CE(NT). The impugned order-in-appeal is upheld to the extent of allowing said rebate claim of Rs.401472 to respondent No.2 M/s Advance Netways Merketing Pvt. Ltd.

10. The revision applications are thus disposed off in terms of above.

12. So, ordered.

(D.P. Singh)
Joint Secretary to the Govt. of India

Commissioner, Central Excise Commissionerate,
Central Excise House, F Block,
Rishi Nagar, Ludhiana.

(Attested)

16/12

(भागवत शर्मा/Bhagwat Sharma)
सहायक आयुक्त/Assistant Commissioner
CBEC-OSD (Revision Application)
वित्त मंत्रालय (वाणिज्य विभाग)
Ministry of Finance (Deptt of Revenue)
भारत सरकार/Govt of India
नई दिल्ली/New Delhi

G.O.I. Order No. 1405-1406 /13-CX dated 13-12-2013

Copy to:-

1. M/s Shirdi Overseas Import & Export, Ludhiana, 851, 1st floor, Industrial Area, Ludhiana
2. M/s Advance Networking Pvt. Ltd., Ludhiana, 863, Industrial Area, Ludhiana
3. The Commissioner, Central Excise Commissionerate, Central Excise House, Rishi Nagar, Ludhiana (Punjab)
4. The Deputy Commissioner, Central Excise Division-I, Ludhiana, Savitri Complex-II, Dada Motor Near Dholewal Chowk, G.T. Road, Ludhiana 141003(Pb).
5. The Commissioner (Appeals-), Central Excise , Chandigarh –II, C.R. Building, Plot No. 19, Sector-17-C, Chandigarh.
5. PS to JS(Revision Application)
6. Guard File
7. Spare Copy.

16/12

(Bhagwat P. Sharma)
OSD (Revision Application)